DISTRICT OF COLUMBIA
DOH Office of Adjudication and Hearings
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Washington D.C. 20002

DISTRICT OF COLUMBIA DEPARTMENT OF HEALTH Petitioner, v. SARAH FERGUSON Respondent	Case Nos.: I-00-40305 I-00-40407

FINAL ORDER

I. Introduction

On December 20, 2000, the Government served a Notice of Infraction (No. 00-40305) upon Respondent Sarah Ferguson alleging that she had violated 29 DCMR 306.1(b). That section requires the operator of a child development center to comply with applicable federal or District of Columbia laws and regulations other than the provisions of 29 DCMR, Chapter 3. The Notice of Infraction described the factual basis of the charge as: "[t]he provider had more than 2 infants enrolled." It alleged that the infraction occurred on November 7, 2000 at 5715 Blaine Street, N.E. and sought a fine of $500.00.

Respondent did not file an answer to the Notice of Infraction within the required twenty days after service (fifteen days plus five additional days for service by mail pursuant to D.C. Code §§ 6-2712(e), 6-2715). Accordingly, on January 19, 2001, this administrative court issued an order finding Respondent in default, assessing the statutory penalty of $500.00 authorized by

D.C. Code § 6-2704(a)(2)(A), and requiring the Government to serve a second Notice of Infraction.

On January 22, 2001, Respondent filed an untimely plea of Deny to the Notice of Infraction.[1] I then issued an order scheduling a hearing for February 22, 2001. That order also required the Government to specify the applicable law or regulation outside 29 DCMR Chapter 3 allegedly violated by Respondent or, in the alternative, to move to amend the Notice of Infraction to allege a violation of a regulation contained within 29 DCMR Chapter 3. In response, the Government moved to amend the Notice of Infraction to charge a violation of 29 DCMR 320.3, which provides: "The caregiver shall be responsible for compliance with all applicable District rules and regulations." The Government also moved to reduce both the fine for the violation and the penalty for Respondent's failure to file a timely answer to $100 each. I granted the motion to amend the charge and to reduce the amounts sought in an order filed on February 7, 2001.

All parties appeared for the February 22 hearing. Nan Reiner, Esq. represented the Government and Respondent represented herself. Based upon the testimony of all the witnesses, my evaluation of their credibility, the documents introduced into evidence and the entire record in this matter, I now make the following findings of fact and conclusions of law.

[1] Shortly after the filing of Respondent's plea, the Government served a second Notice of Infraction (No. 00-40407). Because Respondent had responded to the first Notice of Infraction before service of the second, the second Notice of Infraction will be dismissed as moot.

II. Findings of Fact

Ms. Ferguson operates a child development home at 5715 Blaine Street, N.E., and has been licensed to do so for approximately ten years. Her license authorizes her to care for a total of five children, no more than two of whom can be less than two years old. On November 7, 2001, April Bramble, an inspector employed by the Department of Health, visited Ms. Ferguson's child development home to conduct an annual licensing renewal inspection. Ms. Ferguson was caring for five children at the facility, three of whom were under two years old.

Ms. Ferguson offered no evidence of the reasons for her failure to respond to the first Notice of Infraction within the statutory deadline.

III. Conclusions of Law

A. The Alleged Violation

Ms. Ferguson is charged with violating 29 DCMR 320.3, which provides: "The caregiver shall be responsible for compliance with all applicable District rules and regulations." The Government's theory of the case is that Ms. Ferguson's license prohibits her from caring for more than two infants, yet she had three infants in her care on November 7.[2] It contends that § 320.3 allows the imposition of a fine whenever a caregiver violates not only the "rules and regulations" mentioned in that section but also any condition specified in her license. Section

[2] An "infant" is defined as a child younger than two years old. 29 DCMR 399.1.

320.3, however, only identifies the caregiver as the person in a child development home who can be held liable for any infractions of other rules or regulations that may occur there. It does not prescribe a standard of conduct whose violation subjects a caregiver to a civil fine or other sanction. Consequently, there can be no stand-alone violation of § 320.3.

The Government argues that the civil infractions fine schedule authorizes a fine for violating § 320.3, thereby demonstrating that § 320.3 does establish a standard of conduct that can be violated. The fine schedule provides that "failure to comply with a requirement for caregivers in child development homes" in violation of 29 DCMR 320 is a Class 3 civil infraction, punishable by a $100.00 fine for a first offense. 16 DCMR 3222.2(g). That provision does not specifically cite § 320.3, however. It means only that a fine is authorized for violating any of the subsections of § 320 that impose affirmative requirements upon caregivers, *e.g.*, 29 DCMR 320.5 (requiring a caregiver to develop an emergency plan); 29 DCMR 320.6 (requiring a caregiver to arrange for parent involvement in the child development home's program); 29 DCMR 320.7 (requiring the caregiver to cooperate with District officials).

The Government's argument that §§ 320.3 and 3222.2(g) authorize a $100.00 fine whenever a caregiver violates any of the child care regulations is inconsistent with the principle that regulations applicable to the same subject matter should be interpreted *in pari materia* so that all of them can be given effect. *George v. Dade,* 769 A.2d 760, 764 (D.C. 2001); *Harman v. United States,* 718 A.2d 114, 117 (D.C. 1998); 2B Sutherland, *Statutory Construction* § 51.03 (6th ed. 2000). Indeed, the Government's position would lead to incongruous results in many circumstances. For example, violations of many other regulations applicable to child

development homes already are punishable by higher fines. *E.g.,* 16 DCMR 3222.1(f) (classifying failure to permit an inspection as a Class 2 infraction, subject to a $500.00 fine for a first offense); 16 DCMR 3222.1(k) (failure to provide proper toys and playthings is a Class 2 infraction); 16 DCMR 3222.1(*l*) – (r) (failure to comply with various medical requirements is a Class 2 infraction). The Government's argument does not address how such violations should be treated under its proposed interpretation of § 320.3. On the other hand, violations of many other regulations applicable to child development facilities are Class 4 violations, which carry only a $50 fine for the first offense. 16 DCMR 3222.3. Accepting the Government's argument would mean that operators of child development centers (which are larger and more sophisticated than child development homes) would be liable only for a $50.00 fine for violating such regulations, while caregivers in child development homes could be subject to a higher fine for the same violations. There is no apparent rationale for such a distinction.

Subsection 320.3, therefore, is not a substantive "requirement for caregivers" for which 16 DCMR 3222.2(g) authorizes a civil fine in the event of a violation. Instead, § 320.3 only identifies the caregiver as the appropriate person to be sanctioned for a violation of some other regulation. This result reconciles § 320.3 with the other provisions of 29 DCMR, Chapter 3 and with 16 DCMR 3222, giving effect to the language and intent of each regulation. *See George, supra,* 769 A.2d at 770; *Harman, supra,* 718 A.2d at 117.

Contrary to the Government's argument, this ruling does not leave the Government without a remedy if the operator of a child development home violates a condition of her license. Section 301.1 of 29 DCMR provides: "No person shall either directly or indirectly operate a

child development facility without having first obtained a license from the Mayor *authorizing that operation . . . .*" (Emphasis added.) An operator who fails to comply with a condition of her license necessarily violates § 301.1, because her operation of the child development home is not "authorized" by her license. The Government elected not to charge a violation of § 301.1 in this case, however.[3]

B. Respondent's Failure to Respond to the Notice of Infraction

Respondent offered no evidence of the reasons for her failure to file a timely response to the Notice of Infraction. Accordingly, there is no evidence of "good cause" for her failure, and the Civil Infractions Act requires the imposition of a penalty equal to the fine sought. D.C. Code § 6-2712(f). Respondent, therefore, must pay a penalty of $100.00.

IV. Order

Based upon the foregoing findings of fact and conclusions of law, it is, this _____ day of _____, 2001:

ORDERED, that Notice of Infraction No. 00-40407 is **DISMISSED AS MOOT**; and it is further

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[3] To be sure, the regulations define a "child development home" as "a child development program provided in a private residence for up to a total of five (5) children, with no more than two (2) infants in the group." 29 DCMR 399.1. As the Government recognized at the hearing, a definition can not be violated; only a regulation using that definition can be violated, and the Government has not charged Respondent with violating any such regulation.

ORDERED, that Respondent is **NOT LIABLE** for violating 29 DCMR 320.3; and it is further

ORDERED, that Respondent is liable to pay a statutory penalty for her failure to file a timely answer to the first Notice of Infraction; and it is further

ORDERED, that Respondent shall pay a total of **ONE HUNDRED DOLLARS ($100.00)** in accordance with the attached instructions within twenty (20) calendar days of the date of mailing of this Order (fifteen (15) calendar days plus five (5) days for service by mail pursuant to D.C. Code § 6-2715); and it is further

ORDERED, that, if Respondent fails to pay the above amount in full within twenty (20) calendar days of the date of mailing of this Order, by law, interest must accrue on the unpaid amount at the rate of 1 ½% per month or portion thereof, beginning with the date of this Order. D.C. Code § 6-2713(i)(1), as amended by the Abatement and Condemnation of Nuisance Properties Omnibus Amendment Act of 2000, D.C. Law 13-281, effective April 27, 2001; and it is further

ORDERED, that failure to comply with the attached payment instructions and to remit a payment within the time specified will authorize the imposition of additional sanctions, including the suspension of Respondent's licenses or permits pursuant to D.C. Code § 6-2713(f), the placement of a lien on real and personal property owned by Respondent pursuant to D.C. Code §

6-2713(i), and the sealing of Respondent's business premises or work sites pursuant to D.C. Code § 6-2703(b)(6).

/s/ 8/30/01

John P. Dean
Administrative Judge